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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1273

NATIONAL JEWISH HOSPITAL AND RESEARCH CENTER,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

K. BRUCE STICKLER,
ARTHUR E. BECK,
WOOD, LUCKSINGER & EPSTEIN, P. C.,
444 North Michigan Avenue,
Chicago, Illinois 60611,
Attorneys for the American Hospital Association, Amicus Curiae.

Of Counsel:
LAWRENCE A. MANSON,
General Counsel,
Office of Federal Law and Regulation,
American Hospital Association,
840 North Lake Shore Drive,
Chicago, Illinois 60611.

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INTEREST OF THE AMICUS CURIAE.[1]

The American Hospital Association (hereafter "AHA")[2] files this brief *Amicus Curiae* to present its views in a case of great importance in the application of the National Labor Relations Act to the health care industry.[3] The issue presented in this case

1. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 42(1).

2. The AHA is a non-profit Association of more than 6,500 member institutions engaged in the delivery of health care. It is the largest Association of health care institutions of its kind in the United States.

3. In 1974, Congress enacted Public Law 93-360 (S. 3203) which amended the Taft-Hartley Act to bring voluntary non-profit health care institutions under the federal law.

concerns the burden of proof required of a hospital to justify its regulation of employee solicitation and distribution activity which potentially affects the health and well-being of the hospital's patients, their relatives, visitors and the public.

In 1976, the National Labor Relations Board (hereinafter "the Board") acknowledged that its traditional policies regarding industrial and manufacturing employers' rules regulating employee solicitation and distribution activity are inappropriate for the health care industry. ***St. John's Hospital and School of Nursing, Inc.***, 222 NLRB 1150 (1976).[4] The Board ruled that "special considerations" of the purpose and function of health care institutions justified an expanded prohibition on employee solicitation and distribution activities; but the Board would only permit employer regulation of employee activities in "immediate patient care areas" of a hospital.[5]

The Tenth Circuit, upon review of the Board's *St. John's* decision, disagreed with the Board's ruling, and found that the Board's decision did not sufficiently protect the interests of the hospital, the patients who are served therein or the public who visit the hospital premises. The Tenth Circuit held that hospitals could regulate solicitation and distribution activities in all hospital areas to which patients and visitors have access.[6]

The Board, however, has continued to perpetuate its discredited "immediate patient care area" standard in several cases which have reached various Circuit Courts of Appeal.[7] The result has been predictable. There has emerged from the Courts of

4. See *St. John's Hospital & School of Nursing, Inc.* v. *NLRB, den. enf. in part*, 557 F. 2d 1368 (10th Cir., 1977).

5. *St. John's Hospital & School of Nursing, Inc., supra.*

6. *St. John's Hospital* v. *NLRB, supra.*

7. *Lutheran Hospital of Milwaukee* v. *NLRB*, 564 F. 2d 208 (7th Cir., 1977); *Baylor University Medical Center* v. *NLRB*, 578 F. 2d 351 (D. C. Cir. 1978); *NLRB* v. *Baptist Hospital, Inc.*, 576 F. 2d 107 (6th Cir., 1978); *NLRB* v. *National Jewish Hospital and Research Center, Inc.*, No. 77-1061, ... F. 2d ..... (10th Cir., 1978).

Appeals several conflicting decisions as to where and under what circumstances hospitals may lawfully restrict employee activities. This poses a continuing dilemma for hospitals seeking to fashion rules regulating employee solicitation activity for the purpose of furthering their patient care responsibilities.

On June 22, 1978, this Court decided *Beth Israel Hospital* v. *NLRB*[8]—the first case involving an interpretation of a hospital's solicitation-distribution rule. This Court ruled that Beth Israel's solicitation/distribution rule was overly broad because the infrequency of patient and visitor use of the cafeteria and coffee shop did not warrant the restriction on employee Section 7 rights. Following *Beth Israel*, this Court decided *Lutheran Hospital of Milwaukee, Inc.* v. *NLRB*,[9] and *NLRB* v. *Baylor University Medical Center*.[10] In those cases, it became clear that the Court intended its *Beth Israel* decision to be limited to its own particular factual circumstances where patients and visitors seldom used the cafeteria.

On July 28, 1978, the Tenth Circuit issued its first opinion in the instant case, citing *Beth Israel* to support its enforcement of the Board's determination that the solicitation and distribution rule at National Jewish Hospital was overly broad.[11] On Petition for Rehearing *en banc*, the Hospital and AHA, as *amicus curiae*, argued that the Tenth Circuit should rehear the case as it (1) failed to consider the balancing tests set forth by this Court in its *Beth Israel* decision, (2) failed to consider the effect of this Court's decision in *Lutheran Hospital of Milwaukee, Inc.*, and (3) unreasonably failed to consent to a Board motion requesting a remand to the Board in light of the considerations raised by this Court in *Beth Israel*.

8. ..... U. S. ....., 46 U. S. L. W. 4764 (June 22, 1978).

9. *Lutheran Hospital of Milwaukee, Inc.* v. *NLRB*, ... U. S. ....., 46 U. S. L. W. 3787 (June 26, 1978).

10. *NLRB* v. *Baylor University Medical Center*, ... U. S. ....., 47 U. S. L. W. 3203 (October 30, 1978).

11. *NLRB* v. *National Jewish Hospital and Research Center, Inc.*, No. 76-1061 (July 28, 1978).

The Tenth Circuit, in response to the Petition For Rehearing *en banc*, withdrew its July 28 opinion and on November 2, 1978, substituted a new opinion,[12] based on a different rationale, but affirmed its earlier decision. This new decision acknowledged the significant factual distinctions between the operation of National Jewish Hospital and Beth Israel Hospital. However, the court ruled that National Jewish Hospital had failed to meet the burden of proof required by this Court in its *Beth Israel* decision when it failed to produce "positive evidence showing that solicitation activities had a disrupting effect on patient's health."[13]

The impact of requiring a hospital to show an adverse effect upon a patient's health is, we submit, contrary to what this Court intended in its *Beth Israel* decision. Perpetuation of such an outrageous standard requiring hospitals to subject their patients to unjustifiable risks of physical or emotional harm in order to prove actual patient suffering jeopardizes our country's health care delivery system. It is ironic that justification for having a rule to protect patient health and well-being would require a hospital to prove that without such a rule patients suffer. The AHA urges this Court to grant the Petition for Writ of Certiorari in order to consider the serious problems raised by the Tenth Circuit decision.

REASONS FOR GRANTING THE WRIT.

I. The Tenth Circuit's Decision Is in Direct Conflict with the Intent of the Supreme Court's Beth Israel Decision as Well as Established Board Policy.

Judge Doyle, writing for the Tenth Circuit, stated in his opinion in *National Jewish:*

12. *NLRB* v. *National Jewish Hospital and Research Center*, No. 77-1061 (November 2, 1978).

13. *Id.* at slip op. 10.

> "[W]e must be mindful that the Supreme Court in *Beth Israel* made it plain *that the burden was on the employer to bring forward positive evidence showing that solicitation activities had disrupting influence upon patient's health.* In the dearth of such evidence, it becomes impossible to upset the finding of the Board, and, therefore, there is no alternative except to enforce the Board's order." (emphasis supplied)[14]

In commenting further on what constituted "positive evidence" Judge Doyle noted:

> "The record before us provides *no factual basis for a conclusion that the patients at National Jewish Hospital suffered upset or experienced disruption of tranquility as a result of union solicitation* in the cafeteria or in other places." (emphasis supplied)[15]

In reaching his conclusion that the Board's order should be enforced, Judge Doyle rejected the Hospital's expert medical testimony that the exposure of patients to employee solicitation and distribution activities could well trigger adverse reactions to patient health and recovery. Contrary to Judge Doyle's finding of a "dearth of evidence",[16] the Hospital introduced into evidence substantial medical testimony concerning the operation of National Jewish Hospital as well as a profile of the medical conditions treated at the facility.[17]

National Jewish Hospital and Research Center specializes in the treatment of asthmatic patients who cannot manage to control their physical condition on an outpatient basis. The average length of stay of patients is nine months or longer.[18] The primary factor in the total therapeutic treatment program for patients at National Jewish is the elimination of personal stress and anxieties in patients as well as isolation from situations

14. *NLRB* v. *National Jewish Hospital, supra,* at slip op. 10.
15. *Id.* at 10.
16. *Id.* at 10.
17. See Transcript at 63, 68, 73 and 130.
18. Transcript at 59.

that may cause stress and anxiety for patients.[19] Over ninety percent of the patients are ambulatory and are involved in treatment as a part of their daily program in virtually all areas of the facility.[20] Approximately ninety-five percent of the patients take their meals in the cafeteria (including receiving treatment in the cafeteria via intravenous fluids or medicine and patients who receive oxygen).[21]

The facts outlined above were presented in testimony by both the hospital administrator of National Jewish Hospital and an attending physician specializing in the care of asthmatic patients. Uncontroverted testimony of the effect of stress, anxiety, anger and tension on the asthmatic condition was also presented.[22]

Despite this significant evidence, the court concluded that National Jewish Hospital failed to meet its burden of showing positive evidence of upset patients or disruption occasioned by employee solicitation and distribution activities.[23] This burden of showing actual harm to patients' health, the Tenth Circuit declared, is required by this Court's *Beth Israel* decision.[24]

The American Hospital Association asserts that this interpretation of *Beth Israel* is patently erroneous and should therefore be reversed.

Nowhere in *Beth Israel* does this Court require an employer to produce evidence of actual harm to patients in order to justify a prohibition of employee solicitation and distribution activity in *any* area of a hospital. To the contrary, this Court took great care to point out the serious consequences of adversely affecting a hospital's provision of health care to patients.[25] While the Supreme Court upheld the right of the Board to insure that

19. Transcript at 64, 67, 68, 75.
20. Transcript at 61.
21. Transcript at 130, 66.
22. Transcript at 60, 63, 64, 67, 68 and 75.
23. *NLRB* v. *National Jewish Hospital, supra* at 10.
24. *Id.* at 10.
25. *Beth Israel Hospital* v. *NLRB, supra* at 46 U. S. L. W. 4769.

hospital regulations did not unjustifiably interfere with employees' Section 7 rights, the Court did not revise the Board's prior policy that the employer's burden was one of demonstrating a *likely* interference with disruption to patient care. The *Beth Israel* court certainly did not require that a hospital prove actual harm to a patient's health.[26]

The Court based its ruling in *Beth Israel* upon the evidence which showed the relatively infrequent usage of the cafeteria by patients and their visitors when compared to the widespread employee usage of these same facilities. The court stated that patients are less likely to be subjected to potentially unsettling activities when they do not frequent certain areas of a hospital. Consequently, the Court concluded that it was unreasonable to allow the Hospital to restrict employee solicitation and distribution activity in those areas and upheld the Board's enforcement order on that basis.[27]

The Court never reached the issue of the standard of the severity of impact on patient care (potential v. actual harm to patient) necessary to sustain an employer's regulation of employee solicitation and distribution activity. Consequently, *Beth Israel* left undisturbed the prior Board standard of threatened harm to patient care.

In addressing this issue in the hospital context, the Board has found:

> "[I]t must be recalled that Respondent's facility is not a manufacturing plant, it is a hospital . . . Further, the hospital services ill individuals who, in their weakened condition, may readily be upset if they overhear antiunion—prounion arguments among employees while they (the patients) are in their rooms or in the halls or elevators. And *a hospital need not wait until an untoward incident*

26. *Id.*

27. In contrast this Court, in *NLRB* v. *Baylor University Medical Center, supra,* upheld the D. C. Circuit's determination that the Hospital could restrict employee solicitation and distribution activities in hospital corridors, *without* the necessity of a positive showing of actual harm to patients when it was shown that patients frequently utilized the corridors.

> *actually takes place before undertaking reasonable measures to anticipate and forestall such an occurrence.*" (emphasis supplied)[28]

The Board, in *St. John's Hospital and School of Nursing, supra,* reaffirmed this basic recognition of the special circumstances in hospitals justifying solicitation and distribution restrictions as follows:

> "We recognize that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to carry out that function." *Ibid.;* "All parties further agree that the special circumstances surrounding employment in a hospital setting justify some additional restrictions on employee solicitation and distribution to maintain the tranquil atmosphere essential to the hospital's primary function of providing quality patient care." *St. John's Hospital* v. *NLRB,* 557 F. 2d 1368, 95 LRRM 3058, 3060 (10th Cir., 1977).

In industrial and retail establishments the Board has permitted employers to develop and maintain broad no solicitation/no distribution rules, based only upon notions of "conceivable" *May Department Stores,*[29] "potential" *McDonald's Corp.,*[30] or "possible" *Banker's Club, Inc.,*[31] harm to the customer-employer relationship. Surely, the Tenth Circuit's more severe standard which it would apply to hospitals is unreasonable in view of the real threat which employee activity poses to patient well-being.

The clear implication of the Tenth Circuit's rejection of the Hospital's evidence of expert medical testimony (concerning the potential risk of harm to patients occasioned by employee solicitation and distribution activity), is that only evidence of

28. *Guyan Valley Hospital, Inc.,* 198 NLRB 147 (1972).

29. 59 NLRB 976 (1944), *enf'd* 154 F. 2d 533 (8th Cir., 1945), *cert. den.* 329 U. S. 725 (1946).

30. 205 NLRB 404 (1973).

31. 218 NLRB No. 7 (1975).

actual harm to a patient will suffice to meet the Hospital's burden of proof. AHA asserts that this burden of proof standard is incompatible with the Supreme Court's decisions in *Beth Israel* and the Board's own policy in *Guyan Valley* and *St. John's.*

II. The Tenth Circuit's Requirement of a Showing of Actual Harm Is Injurious to the Purpose of Health Care Institutions in Delivering Care and Insuring the Welfare of Its Patients.

The burden placed by the Tenth Circuit upon hospitals to prove the justification for their no solicitation/no distribution rules through evidence of actual patient harm, requires hospitals to repudiate the very purpose for their existence—the care and well-being of their patients. Under the Tenth Circuit standard, a hospital, like National Jewish Hospital, would be required to demonstrate that a patient suffers actual harm (e.g., asthmatic attack or worse) as a means of justifying its employee solicitation and distribution prohibitions. The implications of this requirement are horrifying.

Under the Tenth Circuit standard, each hospital solicitation and distribution rule would be subject to question until a patient became upset or ill when confronted by employee solicitation or distribution activity. Only upon the occurrence of a patient's suffering, would an institution thereafter be justified in having a no solicitation/no distribution rule regulating employee activity in certain areas of its facility. Not only would a hospital's burden be to show harm to a patient, but it would be required under this standard to prove also that the physical injury to a patient was proximately caused by employee solicitation and distribution activity.

Under this standard, there would be not only the suffering of a patient incurring such harm, but also the real potential for a malpractice suit against the hospital for failing to adequately control its staff and allowing such activity to be the cause-in-fact

of a patient's injury. Such liability, as, for example, in the case of National Jewish Hospital, could be attributed to the hospital. The expert medical testimony developed in the instant case demonstrates knowledge that asthmatic patients are particularly susceptible to physical harm when confronted with controversial, heated or stressful situations such as occur during union solicitations.

Thus, the Tenth Circuit, by rejecting the import of the unrebutted testimony of expert medical and hospital witnesses, has unwittingly subjected National Jewish's patients to unjustifiable risks of harm, as well as subjecting the hospital to potential risks of personal injury liability.

CONCLUSION.

Should this Court presume that *National Jewish* represents an isolated misapplication of *Beth Israel*, AHA wishes to point out that at least one administrative law judge has already cited the Tenth Circuit's *National Jewish* opinion in support of another equally unsettling health care industry solicitation/distribution case.[32] There is every likelihood that additional Board decisions will embrace this *National Jewish* standard.

AHA asserts that the Tenth Circuit's decision in this case places its several thousand members in a position of jeopardy in attempting to deal with the effects of employee solicitation and distribution activity. AHA believes that the Tenth Circuit's decision is untenable and erroneous in light of the realities of hospital operations today. Furthermore, AHA asserts that this Court must reverse the Circuit's decision in order to restore the proper balancing of interests set forth in its *Beth Israel* decision.

32. See *Yale New Haven Hospital and District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO*, Case No. 1-CA-14509 (1978).

For all of the above reasons, as well as for the reasons set forth by the Petitioner in its brief, AHA respectfully requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

K. BRUCE STICKLER,
ARTHUR E. BECK,
WOOD, LUCKSINGER & EPSTEIN, P. C.,
444 North Michigan Avenue,
Chicago, Illinois 60611,
Attorneys for the American Hospital Association, Amicus Curiae.

Of Counsel:
LAWRENCE A. MANSON,
General Counsel,
Office of Federal Law and
Regulation,
American Hospital Association,
840 North Lake Shore Drive,
Chicago, Illinois 60611.